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IN THE

Supreme Court of the United States

October Term, 1985

MICHAEL THOMAS ROSE,

Petitioner,

v.

THE SUPREME COURT OF THE STATE OF COLORADO,

Respondent.

REPLY BRIEF

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The Petition for Writ of Certiorari in this case showed that Petitioner's application for admission to the Colorado State Bar had been denied after proceedings that egregiously failed to provide him with due process; that despite his later admission to the Colorado Bar the consequences of the

earlier denial continue to cause him serious harm -- including the publication by the Chief Justice of this Court of damaging remarks about his character; and that he is prevented from responding effectively to the assertions made against him by a prior restraint Order of the Colorado Supreme Court that forbids him from discussing publicly the circumstances surrounding his rejection and later admission to the State Bar.

Respondent's Opposition does not dispute these facts, but urges that the Petition be denied on several procedural grounds, none of which have merit.

Respondent first argues that the petition should be denied as jurisdictionally out of time. Respondent wholly ignores the fact that Rose's Petition for Writ of Certiorari was submitted well within ninety days after the Colorado Supreme Court denied his Petition for

Relief. Instead, Respondent rather wistfully states that the Petitioner is not really seeking to have that decision reviewed at all. According to the Respondent, what the Petitioner actually wants reviewed is the Colorado Supreme Court's 1977 denial of his admission to the bar and the 1982 letter to Rose from the Clerk of the Colorado Supreme Court in which the Clerk reported that the Colorado Court refused to rescind its rules and orders of confidentiality (Opposition at 7). The simple answer is that Petitioner is seeking review only of the Order to which his Petition is addressed. The Colorado Supreme Court did not dismiss but denied his 1985 Petition for Relief, thus indicating that it had considered that Petition on its merits. (Petitioner's Appendix A). Those merits are therefore properly before this Court for review.

Respondent misconstrues the harm which Rose suffers and the remedy he seeks. It is true, as Respondent contends, that Rose raised due process arguments in 1977 in his Amended Petition for Admission (Opposition at 9). At that time, however, the sole harm Rose sought to allay was the State's 1977 refusal to permit him to practice law. Rather than appeal that refusal, as Respondent in hindsight argues Rose should have done, Rose instead simply reapplied to the Bar. As events demonstrated, that was the simplest and most direct way for Rose to be allowed to practice law -- it was the remedy that most effectively addressed the harm Rose suffered at the time. Obvicusly, Rose could not have then foreseen the harm he would suffer years later from the publication of confidential and misleading information by this Court, or from the secret circulation by Justice Groves

of confidential documents. It was not until well after 1977 that Rose even learned that Justice Groves was distributing such material. In 1977, Rose could only assume that he was protected from such harm by the rules and orders of confidentiality which governed Colorado bar admission proceedings. Even when Rose consented to have certain information forwarded to this Court, he did so relying on this Court's express assurance that the information would be kept confidential. Rose reasonably expected this Court to honor that assurance. Thus, in 1977, when Rose asserted that he was denied admission to the Colorado Bar without due process, he was aware of neither the extent of those violations nor the dimension of the harm he would suffer from them. His arguments in 1977 did not address or anticipate that harm. His 1985 Petition for Relief was the first time he raised or was

able to raise due process concerns to address those new injuries. It is undisputed that Rose's Petition for Writ of Certiorari was submitted to this Court within ninety days after the Colorado Supreme Court denied the Petition for Relief. Rose's Petition is therefore timely.

Respondent also takes Rose to task for failing to raise First Amendment issues in his 1982 Motion to Withdraw the Rules and Orders of Confidentiality (Opposition at 10). Rose raised no First Amendment arguments at that time because none applied. It is important to note that former Colo. R. Civ. P. 216, which governed Colorado Bar admissions proceedings at that time, provided that certain information shall be held confidential by "the Committee and the Court" (emphasis added). It did not, by its terms, restrict Rose in any way. To the

contrary, Rose voluntarily placed himself under its restrictions when he requested, in 1980, that the admissions proceedings remain confidential. In effect, by submitting to that rule, Rose waived his First Amendment right of free speech on condition that the entire proceedings remain confidential. This waiver received judicial imprimatur under the Special Master's Order (Petitioner's Appendix F at 30A). When this Court breached that condition of confidentiality, Rose sought, by way of his Motion to Withdraw the Rules and Orders of Confidentiality, to withdraw that waiver. It was only when the Colorado Supreme Court denied Rose's request to withdraw the rules and orders of confidentiality that Rose's waiver ceased to be voluntary, and that Rose's First Amendment rights began to be violated.

Respondent insinuates in its Summary of Argument (but never argues)

that Rose should have directly appealed the letter from the Colorado Supreme Court Clerk (Petitioner's Appendix B) which informed Rose that that Court would not rescind the Special Master's Order. Because he failed to do so, the Respondent implies, Rose's petition should be denied (Opposition at 7). The argument is absurd. This Court sits to review the final judgments, on questions of federal law, of the highest state courts in which decisions may be had, not the correspondence of court clerks. See 28 U.S.C. § 1257.

Respondent disingenuously cites District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 483-5, n.16 (1983), to support its flawed contention that Rose's "failure to raise his constitutional arguments when he first submitted his underlying claims to the state court should preclude this court from now

considering such claims." (Opposition at 10). The very same footnote to which the Respondent refers contains the following language:

> . . . One of the policies underlying the requirement that constitutional claims be raised in state court as a predicate to our certiorari jurisdiction is the desirability of giving the state court the first opportunity to consider a state statute or rule in light of Federal constitutional arguments. A state court may give the statute a saving construction in response to those arguments. [citations omitted]
>
> . . . It is important to note . . . the strength of the state interest in regulating the state bar. As we stated in Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S.Ct. 2004, "The interest of the states in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts'. [citation omitted] [emphasis added]

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 483-5, n.16 (1983). Clearly, then, the footnote upon which

Respondent so heavily relies actually stands for the proposition that, especially in cases involving bar admissions issues, this Court will not review claims that the state court has not had an opportunity to review first. The explanation for this is simple: States have a great interest in regulating their own bars. To argue from this footnote that Rose should have sought review in this Court rather than relief in state court penalizes Rose for litigating in state court what is of State interest and turns the logic of this footnote inside-out. Only now has the Colorado Supreme Court had ample opportunity to review these claims. Only now are these issues ripe for review by this Court.

Respondent's second procedural argument is that no special or important reasons exist for granting Rose's Petition. Although Respondent admits that

Rose's right of free speech is to this day subject to the prior restraint of the Special Master's Order (Opposition at 13), Respondent apparently dismisses this right as one too trivial to concern this Court.

Respondent first contends that "the circumstances surrounding [Rose's] first application for admission and denial thereof are of interest only to the original parties, Mr. Rose and the Colorado Supreme Court." (Opposition at 12). In this, and in Respondent's contention that Rose's subsequent admission to the Colorado Bar cleared his name with respect to the first denial, the Respondent blithely forgets the Chief Justice's dissent or the attention that dissent merited in the New York Times, The Washington Post, the Denver Post, The National Law Journal, and the Colorado Springs Sun. All of this occurred after Rose was admitted to the Colorado Bar. Clearly, when

the Chief Justice wrote his dissent (in which Justice O'Connor concurred), he was interested in the circumstances surrounding Rose's first application for admission, and he was not persuaded that Rose's name had been cleared by his eventual admission to the Bar of Colorado. Clearly, too, the Bar Committees of two states are interested in the matter or they would not be stalling Rose's application because of it (Petitioner's Appendix F at 131a). Finally, lawyers who oppose Rose are sufficiently interested in the matter to take the trouble to cite and quote the Chief Justice's dissent in virtually every case in which Rose is involved. As the Chief Justice has acknowledged, society's interest in allegations of wrongdoing is longlasting:

> "The opinions of this Court have long recognized the opprobrium which . . . our society attribute[s] to allegations of dishonor among commissioned

> officers of our Armed Forces. The stigma which our society imposes on the individual who has accepted such a position of trust and abused it is not erasable, in any realistic sense, by the passage of time or even by subsequent exemplary conduct . . ."

Department of the Air Force v. Rose, 425 U.S. 352, 383-4 (1976) (citations omitted) (emphasis added). In view of all this, Respondent's contention that the matter is of "interest only to the original parties" is plainly wrong.

As to Rose's claims of due process violations, Respondent argues that the Colorado Supreme Court properly refused to grant his Petition for Relief "given (1) the fact that in his second application for admission . . . Rose admitted the validity of the factual findings and the impropriety of actions on which the denial of his first application was based, (Respondent's Appendix E at pp. 30b, 32b, and 33b); and (2) the fact

that Rose specifically asserted the defense of res judicata in the second round of admission proceedings with respect to factual determinations made in the first." (Opposition at 13).

One may search Respondent's Appendix E for the admission the Respondent alleges exists. That admission is not to be found. Rather, in his pro se Amended Petition for Admission (Respondent's Appendix E), one finds six paragraphs devoted to recapitulating Petitioner's 1977 Due Process Argument (pp. 28b-29b), and an assertion that the Bar Committee's findings "no longer are valid" because (a) their conclusion that "'the inclinations evidenced by the applicant's conduct are likely to be carried over by the applicant in the practice of law' has proved not to be true"; (b) the Minnesota Bar Committee, after investigating the circumstances of the denial of Rose's admission

to the Colorado Bar, still admitted him to that State's Bar; (c) Rose never knowingly misrepresented his professional status; (d) Rose's suspension from the State of Pennsylvania's Bar was a purely bureaucratic error which in no way reflected on Rose's ethical qualifications; (e) Rose's alleged "lack of candor" resulted from inexperience and poor judgment rather than dishonesty and lack of integrity; and, finally, (f) Rose is, despite the Bar Committee's findings, a member in good standing of seven different Bars (Respondent's Appendix E at 30b-32b). Given its context, Rose's contention that the Bar Committee's findings "no longer are valid" is a far cry from being an admission that they ever were valid, factually or otherwise. In addition, Rose's assertion that the first admissions proceedings are res judicata on the second

hardly amounts to a waiver of his due process rights.

Respondent argues that no "special or important reasons exist for the granting of certiorari to review Rose's claims relating to the rules and orders of confidentiality," (Opposition at 13) because, as Respondent reasons, Rose's complaint is actually with former Colo. R. Civ. P. 216. That simply is not so. Former Rule 216 compelled only the Committee and the Court to hold information confidential; it did not restrict the applicant. By its terms, then, that Rule never applied to Rose; it was only through the Special Master's Order that Rose was compelled to obey that Rule. Consequently, the State's rationalization of Former Rule 216 is wholly irrelevant. Rose is restrained only by the Special Master's Order and the Colorado Supreme Court's refusal to rescind that Order.

Respondent does not -- and cannot -- justify these.

Of all Respondent's contentions, the most illogical is that, "as a practical matter," Rose has already been provided by the Colorado Supreme Court with the ability to respond to the allegations in the Chief Justice's dissent. While it is true, as Respondent contends, that Rose has been relieved of the restrictions concerning the material which was sent to this Court, it is also true that the Colorado Supreme Court only sent this Court material which was critical of Rose. In effect, the Colorado Supreme Court has merely allowed Rose to base his response to the Chief Justice's dissent on the same material which damned him in the eyes of the Chief Justice. He is affirmatively prohibited from relying on any of the favorable material that the Colorado Supreme Court chose not to send to this

Court. This is analogous to permitting John the Baptist to prepare a defense based only on Salome's affidavit.

At no stage of any of the State proceedings has Rose been permitted to offer evidence in his own support or to rebut evidence offered against him. Even after the proceedings, Rose has had to suffer, in silence, the consequences of their adverse findings. Aside from being unfair, the actions of the Colorado Supreme Court are unconstitutional. By granting certiorari, this Court can alleviate Rose's injury and remedy a constitutional wrong.

Respectfully submitted,

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